MALAYSIA AIRLINES SDN BHD & ANOR v. AIRASIA COM TRAVEL SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
AZLAN SULAIMAN JC
[CIVIL SUIT NO: WA-22IP-14-03-2022]
6 JULY 2023

Abstract – *Although delay per se can defeat an application for interim injunction, such delay can be overlooked if the applicant can proffer an acceptable explanation for it.*

CIVIL PROCEDURE: *Injunction – Interim injunction – Application to restrain operator of low-cost airline transportation services from dealing with applicant's trademarks – Delay in filing application – Whether delay inordinate or inexcusable – Whether acceptable explanation proffered – Whether there were bona fide issues to be tried – Whether balance of convenience tilted in favour of granting interim injunction – Whether damages adequate remedy*

The plaintiffs were in the business of providing airline transportation services and other related services while the defendant was the operator of a low-cost airline transportation services under the brand name 'AirAsia'. In carrying out its businesses, the plaintiffs used various trademarks, which consist of the words 'Malaysia Airlines', 'Firefly' or combinations of these words with their respective logos. These trademarks were registered under the name of the second plaintiff. The present action filed by the plaintiffs against the defendant involved 12 of such trademarks ('plaintiffs' marks'). In the present action, the plaintiffs were claiming from the defendant damages and other reliefs for trademark infringement, passing off, trade misrepresentation and unlawful interference with trade. According to the plaintiffs, the defendant had, through an app called the 'AirAsia Super App' ('SuperApp'), used the plaintiffs' marks without the plaintiffs' permission. Through the SuperApp, the defendant would source the plaintiffs' airline tickets from other travel agents registered with the International Air Transport Association (IATA), and then sell the tickets to the consumers. Seven and a half months after filing the present action, the plaintiffs filed this application for an interim injunction to restrain the defendant from continuing their use of the plaintiffs' marks in the SuperApp ('plaintiffs' application') until the full and final disposal of the present action. Pursuant to the affidavits and written submissions filed by the parties, the issues that arose in determining the plaintiffs' application were: (i) whether there was inordinate and inexcusable delay in the filing of the plaintiffs' application such as to defeat it; (ii) whether there were *bona fide* issues to be tried; (iii) whether the balance of convenience lay in favour of granting or refusing the interim injunction; and

(iv) whether damages was an adequate remedy. In respect of issue (iii), the defendant had, among others, asserted the following grounds: (i) the plaintiffs' airline tickets were also offered for sale in other well-known travel websites; (ii) the plaintiffs' complaints predominantly concerned with problems pertaining to ticket bookings, and not with confusion between airlines; (iii) trial dates for the present action had already been fixed; and (iv) the plaintiffs' application, if allowed, would gravely impact the defendant's business.

Held (allowing plaintiffs' application):

(1) Although delay *per se* could defeat an application for interim injunction, such delay could be overlooked if there was an acceptable explanation for it. The plaintiffs had proffered an acceptable explanation, in that, the delay was due to their decision to first try their own measures to block the sale of their airline tickets in the SuperApp. It was only when the measures were proven to be futile, as the defendant by itself or through the aid of one Kiwi.com, could circumvent the same, did the plaintiffs resort to this court for assistance. As such, the plaintiffs should not be at fault for the delay, and instead, they should be commended for their efforts. Also, at the time the plaintiffs filed the application, no trial dates had been fixed. These and the finding that the defendant had also applied for an application for further and better particulars, which had to be resolved before the fixing of the trial dates, there was no inordinate or inexcusable delay in the filing of the plaintiffs' application. (paras 19-23)

(2) It was the plaintiffs' allegation that the defendants' acts constituted trademark infringement, passing off, trade misrepresentation and unlawful interference with trade. This allegation was denied by the defendant. The conflicting stands between the parties clearly showed that there were *bona fide* serious issues to be tried. (para 24)

(3) The balance of convenience lay in issuing the interim injunction. This was due to the reasons that: (i) the excuse advanced by the defendant that they had not committed any wrong by selling the plaintiffs' airline tickets in the SuperApp because other websites were also selling the same could not be accepted; (ii) irrespective of the nature of the plaintiffs' complaints, the likelihood of damage to the plaintiffs' business due to the defendant's acts was real, and not imagined; (iii) just because the trial dates of the present action were near to the date of the filing of the plaintiffs' application, it did not mean that an injunctive relief could not be issued. In fact, a few days before the hearing of the plaintiffs' application, the defendant had filed another application, in which some of the documents related to the said application had yet to be filed by the defendant. Therefore, there was no guarantee that the trial of present action would proceed on those trial dates; and (iv) it was not the

plaintiffs' nor the court's duty or responsibility to support or prop the defendant's business. This was especially when in the present scenario the defendant had infringed the plaintiffs' right to the plaintiffs' marks. (paras 28-32)

(4) In the case of *New-West Management Group Sdn Bhd & Anor v. Ng Ah Kow & Anor*, it was stated that: (i) damages in respect of passing off was notoriously difficult to quantify; and (ii) damages in respect of loss of goodwill and reputation was not quantifiable and could not be compensated easily. The court concurred with the cited case. Therefore, it was held that damages was not an adequate remedy. (paras 35 & 36)

(5) The acts to be injuncted had been adequately described by the words appearing in prayer 1.1(ii) of the plaintiffs' application. The plaintiffs' application was allowed with costs, with among others, the terms that the defendant (including its representative and *etc*) be restrained until the full and final disposal of the present action from: (i) dealing with the plaintiffs' marks; (ii) selling the plaintiffs' airline tickets on SuperApp; and (iii) enabling, assisting, causing, procuring or authorising others to do any of the acts as mentioned in (i) or (ii). (paras 40-43)

Case(s) referred to:

Alor Janggus Soon Seng Trading Sdn Bhd & Ors v. Sey Hoe Sdn Bhd & Ors [1995] 1 CLJ 461 SC ***(refd)***

Keet Gerald Francis Noel John v. Mohd Noor @ Harun Abdullah & Ors [1995] 1 CLJ 293 CA ***(refd)***

New-West Management Group Sdn Bhd & Anor v. Ng Ah Kow & Anor [2008] 8 CLJ 18 HC ***(refd)***

Perak Hydro Renewable Energy Corporation Sdn Bhd & Anor v. Wak Ngah Pili Bah Adim [2022] 10 CLJ 540 CA ***(refd)***

For the Plaintiffs - Indran Shanmuganathan, Yap Khai Jian & Jessica Lim Wei Zhen; M/s Shearn Delamore & Co

For the defendant - Ambiga Sreenevasan, Brian Law & Nur Aliya Shazreen Sher Mohammad; M/s Law Partnership

Reported by Syamim Ariffin

JUDGMENT

Azlan Sulaiman JC:

Introduction

[1] The plaintiffs are in the business of providing airline transportation services, travel booking services, travel booking agency services, air travel services, travel reservation and booking services, *etc*. So is the defendant, who operates low-cost airline transportation services under the "AirAsia" brand.

[2] The plaintiffs use various trademarks, consisting of the words "Malaysia Airlines" or "Firefly" or those words with their respective logos. Those trademarks are registered under the second defendant's name. This action involves 12 of them (collectively, "plaintiffs' marks").

[3] This action against the defendant is for damages and other relief for trademark infringement, passing off, trade misrepresentation and unlawful interference with trade. Their action is predominantly based on the allegation that the plaintiffs' marks appear on the defendant's app known as the "AirAsia Super App" ("SuperApp"). Through the SuperApp, the defendant sources the plaintiffs' airline tickets from other travel agents registered with the International Air Transport Association (IATA).

[4] The defendant's stand is that the alleged acts do not amount to trademark infringement, passing off, trade misrepresentation or unlawful interference in trade.

[5] Seven and a half months after filing this action, the plaintiff filed an application ("plaintiffs' application") for an interim injunction to restrain the defendant *et al* until the disposal of this action.

A Preliminary Matter

[6] After hearing the parties on the plaintiffs' application on 22 June 2023, I deferred my decision on it to 4 July 2023.

[7] Immediately after the case was called up on 4 July 2023 and the counsel for the parties had been customarily introduced, learned counsel for the defendant sought leave to address the court before I pronounced the decision. She referred to the letter dated 3 July 2023 that the defendant's solicitors had sent to the court under cover of which was enclosed a proposed undertaking the defendant was prepared to provide to the plaintiffs. If accepted (and though neither the letter nor the undertaking expressly said so), it would dispense with any decision being made on the plaintiffs' application and it would presumably be withdrawn altogether. She also informed me that the proposed undertaking had been forwarded to the plaintiffs' solicitors who, due to shortness of time, had yet to respond. She also apologised for this late development.

[8] Obviously, the ball was now in the plaintiffs' court, and the court needed to get the plaintiffs' views on this latest development. Learned counsel for the plaintiffs confirmed that he had received the proposed undertaking and further confirmed that he had not been able to revert, because he had yet to obtain the plaintiffs' instructions, more so because internally the plaintiffs' response to the proposed undertaking had to be higher taken up internally within their respective organisations for a decision. Crucially, learned counsel for the plaintiffs also informed the court that his instructions were to proceed with the plaintiff's application and to receive the court's decision on it if indeed the court was ready to deliver it.

[9] In reply to that, learned counsel for the defendant said that, if the court were of the view that the proposed undertaking was fair and reasonable, then the court could order it instead of making a decision on the plaintiff's application. She invited the court to do that.

[10] I declined to accept that invitation, for I am of the view that the court cannot do that.

[11] At issue was the plaintiffs' application, and for as long as the plaintiffs intended to proceed with it, then there were only two possible outcomes: the court decides either to allow it or dismiss it. It is not open for the defendant – or the respondent to any interlocutory application or matter of whatever nature before the court – to lay a proposal before the court and invite the court to order it *in lieu* of making its decision on the application or matter, if the court was of the view that an unaccepted proposal between the parties was a fair and reasonable alternative to deciding it.

[12] Save for during the process of a court-based mediation, the court is not the avenue for parties to make proposals between them. Proposals to resolve or dispense with any matter before the court, including applications of whatever nature between the parties, are strictly between the parties and are to be discussed and resolved between the parties, it is only when the parties come to a consensus should the court be appraised of it. Whether or not a proposal between the parties is fair and reasonable is not for the court to decide; only the parties can. Should a court take it upon itself to decide on a proposal that is strictly between the parties against the wishes of either of the parties, then it would be stepping into the arena, which it cannot do and which should be avoided.

[13] That said, I will now move on to the plaintiffs' application.

The Issues

[14] Based on the parties' affidavits and written submissions, the issues to be decided are:

(i) whether there was inordinate and inexcusable delay in the filing of the plaintiff's application such as to defeat it;

(ii) whether there are *bona fide* serious issues to be tried;

(iii) whether the balance of convenience lies in favour of granting or refusing the interim injunction; and

(iv) whether damages is an adequate remedy.

Keet Gerald Francis Noel John v. Mohd Noor @ Harun Abdullah & Ors [1995] 1 CLJ 293; [1995] 1 MLJ 193 is the usual go-to authority for issues (ii), (iii) and (iv).

Whether There Was Inordinate And Inexcusable Delay

[15] The defendant's stand is that the plaintiff's application should be dismissed on the ground of delay alone. Of the several cases it relies on, the defendant emphasises the relatively recent decision of *Perak Hydro Renewable Energy Corporation Sdn Bhd & Anor v. Wak Ngah Pili Bah Adim* [2022] 10 CLJ 540; [2022] 6 MLJ 698, in which the Court of Appeal held that inordinate delay on the part of the plaintiffs in filing the application for interlocutory injunction could itself be a ground to refuse it. Kamaludin Md Said JCA said:

> In our view, the law is very clear that the application for interlocutory injunction must be made promptly. The plaintiffs must file the application sooner or within a reasonable time to prevent damage or further damage to the land areas as claimed by them.

[16] The defendant submits that delay is indeed inordinate when viewed in the context of the following time lines in this case:

Date	Particulars
10.12.2021	Cease and desist letter issued to the defendant
20.12.2021	Defendant denied any infringement/wrongdoing
24.12.2021	Plaintiffs replied to the defendant
31.03.2022	Plaintiffs filed the writ
15.11.2022	Plaintiffs' application filed

Analysis And Decision

[17] In *Alor Janggus Soon Seng Trading Sdn Bhd & Ors v. Sey Hoe Sdn Bhd & Ors* [1995] 1 CLJ 461; [1995] 1 MLJ 241, Jemuri Serjan CJ (Borneo) said:

> As with all equitable reliefs, delay is a relevant factor in interlocutory proceedings for injunctive relief. An important maxim in regard to delay is that equity aids the vigilant, and not those who sleep on their rights; '*vigilantibus, non dormientibus, jura subeniunt*'. The essence of an application for interlocutory injunction is that it should be made with promptitude.
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> It is said that the court will not grant an interlocutory injunction if the plaintiff having sufficient notice of the defendant's intention to commit the act sought to be restrained is guilty of unreasonable delay in applying to the court.
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> The illustration of this principle is to be found in the case of *Salisbury v. Metropolitan Railway Co* (1870) 22 LT 839. The cases of *Hj Wan Habib Syed Mahmud* [1986] 2 MLJ 198 and *Chung Khiaw Bank Ltd* [1968] 1 MLJ 299 cited above are Malaysian authorities on the same point.
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> It must be pointed out, however, that not all delay is bad delay or, to be precise, inexcusable, as it may be explained or inevitable.

Salmon LJ in *Allen v. Sir Alfred McAlpine & Sons Ltd* [1968] 2 QB 229; [1968] 1 All ER 543; [1968] 2 WLR 366 set out three factors which are relevant in considering whether delay should be allowed as a ground to refuse an interlocutory injunction. These factors are at [1968] 2 QB 229 at p. 268; [1968] 1 All ER 543 at p. 561; [1968] 2 WLR 366 at p 390. Salmon LJ said:

> ... In order for such an application to succeed, the defendant must show:
>
> (1) that there has been inordinate delay. It would be highly undesirable and indeed impossible to attempt to lay down a tariff – so many years or more on one side of the line and a lesser period on the other. What is or is not inordinate delay must depend upon the facts of each particular case. These vary infinitely from case to case, but inordinate delay should not be too difficult to recognize when it occurs.
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> (2) that this inordinate delay is inexcusable. As a rule, until a credible excuse is made out, the natural inference would be that it is inexcusable.
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> (3) that the defendants are likely to be seriously prejudiced by the delay. This may be prejudice at the trial of the issue between themselves and the plaintiff, or between each other, or between themselves and the third parties. In addition to any inference that may properly be drawn from the delay itself, prejudice can sometimes be directly proved. As a rule, the longer the delay, the greater the likelihood of serious prejudice at the trial. It must also be emphasised here what is important to consider is not so much the length of the delay but whether the delay has in some ways made it unjust to grant the injunction claimed.

[18] In the *Perak Hydro Renewable Energy* case, the Court of Appeal referred to this passage in *Alor Janggus*. The Court of Appeal's finding that the inordinate delay in that case was a ground to refuse the interlocutory injunction the plaintiff applied for must be seen in the context of the facts of that case. There, the plaintiff filed the action in 2018 but only applied for the interlocutory injunction over four years later in October 2020, after the trial dates had been fixed. Further, the plaintiff had not proffered any explanation for the delay. These facts are evident from paras. 33-39 of the Court of Appeal's judgment, in which Kamaludin Md Said JCA said:

> In the present case, the plaintiffs commenced this action in 2018. The plaintiffs in their statement of claim also claim that in 2016, the defendants were trespassing on the said land. However, the plaintiffs only filed the writ and statement of claim on 25 April 2018 and took out an application for injunction in October 2020.
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> The defendants have started the preliminary works since 2011 and the construction work commenced in 2016. In fact, the plaintiffs admitted that sometime in March 2012, the defendants had wrongly encroached and

commenced works of the hydroelectric dams in Ulu Geruntum, which entailed land clearing for the relevant structures of the mini hydroelectric dams. The plaintiffs were also aware that the defendants had thereafter started the land clearing work and built structures needed for the purposes of building the mini-hydroelectric project. A

Having notice of these events, no prompt action whatsoever has been initiated by the plaintiffs to prevent the project from being continued. There was a four years delay from the time the defendants commenced the works. B

Since filing the action in 2018, the plaintiffs failed to file the application for interlocutory injunction promptly but waited for the case to be fixed for full trial which was subsequently fixed on 3 March 2020. On 4 October 2020 the plaintiffs' solicitor wrote to the defendants' solicitor to cease their encroachment and works. The plaintiffs filed the application on 9 October 2020. In the circumstances we agree with the defendants that there is delay in filing the application for interlocutory injunction. The plaintiffs should come to court with clean hands and delay, acquiescence or other inequitable conduct may go against the grant of an injunction. C D

The learned judicial commissioner in his grounds of judgment held that there is no delay in filing the application based on his finding that the complaint made by the plaintiffs on the damage caused on the land areas in Ulu Geruntum is something which is continuing. He found the last incident was on 3 October 2020 and the application was filed on 9 October 2020. E

Further, if there is any delay, it does not cause injustice to allow the application. The main issue is with regard to plaintiffs' customary lands and the preservation of the lands. The loss suffered by the defendants are financial loss. F

We do not agree with the reasons that the plaintiffs' complaint is continuing therefore the filing of the application on 9 October 2020 is not a delay. In our view, the law is very clear that the application for interlocutory injunction must be made promptly. The plaintiffs must file the application sooner or within a reasonable time to prevent damage or further damage to the land areas as claimed by them. G

The defendants had already commenced construction works in 2016. The plaintiffs' continuous complaints about the alleged damage to the lands caused by the construction works of the defendants does not assist them unless prompt action was taken to stop or prevent the damage or further damage from happening. Why did the plaintiffs waited until the alleged last incident on 3 October 2020 and only acted by filing the application on 9 October 2020. The filing of the application after the full trial was fixed on 3 March 2020 and later, on 9 October 2020 which is four years later militates against the grant of injunction. The failure to file the application promptly suggests that no serious damage had been caused to the said lands' areas by the defendants. The delay in taking action also suggests H I

A that the plaintiffs could continue with their livelihood at the said land areas during the construction works. There is no explanation given by the plaintiffs why the application was only made on 9 October 2020 and not before.

[19] Thus, whilst delay *per se* may defeat an application for an interim B injunction, the delay may be overlooked if there is an acceptable explanation for it.

[20] Unlike in the *Perak Hydro Renewable Energy* case, the plaintiffs here did proffer an explanation for the delay. In short, they had first decided to try on their own with their own measures to block the sale of their airline tickets C placed through the SuperApp and thereby stop the alleged infringement (collectively "blocking measures"). However, these blocking measures proved to be unworkable as the defendant managed to circumvent them, on its own and also assisted by one Kiwi.com, by continuing to manage transactions for the sale of the plaintiffs' airline tickets on the SuperApp D through other IATA agents. It was only then that the plaintiffs approached this court for assistance.

[21] I find that this explanation is acceptable. The plaintiffs cannot be faulted – and in my view commended – for first trying to dispense with the need for an interim injunction on their own, by taking measures well within E their rights, and only troubling the court when their efforts were felled by the defendant, with the assistance of others, circumventing those efforts.

[22] Furthermore, unlike in the *Perak Hydro Renewable Energy* case, when the plaintiff's application was filed, trial dates had yet to be fixed. Here, trial dates were only fixed at the case management on 31 January 2023, at time F when the plaintiff's application was still undergoing case management for exchanging affidavits and fixing dates for written submissions and hearing. Besides, upon entering an appearance to the writ, the defendant had filed its own application for further and better particulars, which had to be resolved before those trial dates were fixed.

G **[23]** In conclusion, I find that delay in this case does not defeat the plaintiffs' application. Thus, I move on to deal with the other three issues common to applications for interim injunctions.

Whether There Are Bona Fide Serious Issues To Be Tried

H **[24]** The short answer to this is that there must surely be serious issues to be tried. The plaintiffs allege that the defendant's acts constituted trademark infringement, passing off, trade misrepresentation and unlawful interference in trade, and the defendant says they are not. Those conflicting stands surely mean that there are serious issues to be tried.

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[25] Without in any way wishing to determine, dictate or limit the issues that need to be decided at trial, here are just some basic issues suggested:

(i) whether the use of the marks on the SuperApp in the manner and way in which they did and do constitutes trademark infringement under the Trademarks Act 2019?

(ii) whether the use of the marks on the SuperApp of the marks in the manner and way in which they did and do constitutes passing off?

(iii) whether the use of the marks on the SuperApp in the manner and way in which they did and do constitutes trade misrepresentation?

(iv) whether the defendant's acts constitute unlawful interference with the plaintiffs' trade?

The Balance Of Convenience

[26] The plaintiffs proffer several reasons for contending that the balance of convenience lies in favour of injunction being granted. These include the following:

(i) there is no dispute as to ownership of the plaintiffs' marks or that they appear on the SuperApp;

(ii) some of the plaintiffs' marks that appear on the SuperApp have been altered or distorted;

(iii) the plaintiffs have already received over 70 complaints from disgruntled customers who have purchased the plaintiffs' tickets over the SuperApp and have been asked to bring forth those complaints to the plaintiffs for resolution and/or refunds;

(iv) the continuation of the defendant's acts will adversely affect the plaintiffs and will destroy the value and reputation of the plaintiffs' marks, their brand and their trade that they have painstakingly built up for decades;

(v) the defendants conduct in having requested for permission to use the plaintiffs' marks and sell the plaintiffs' tickets, and proceeding nonetheless to do so despite never getting that approval, and still denying the plaintiffs even after being demanded to cease and desist doing so;

(vi) circumventing the plaintiff's efforts to stop those acts on its own and also assisted by one Kiwi.com, by managing transactions for the sale of the plaintiffs' airline tickets on the SuperApp through other IATA agents;

(vii) continuing to do so unabashedly to date; and

(viii) the injunction sought will not adversely affect the defendant's business or the SuperApp because the defendant can still sell tickets of the other airlines on it.

[27] On the defendant's part, learned counsel for the defendant submitted that the balance of convenience lay in refusing the injunction because, *inter alia*:

(i) the plaintiffs' airline tickets are also offered for sale on other well-known online travel websites like Skycanner.com, Traveloka.com, Expedia.com, Agoda.com;

(ii) the complaints predominantly concern problems with ticket bookings, and do not indicate confusion between the airlines;

(iii) trial dates were fixed for four days in August 2023, just weeks away now. It is most likely that a decision on this action will be delivered before the year is out; and

(iv) the sale of the plaintiffs' tickets constitutes the lions share of trading volume on the SuperApp, and the injunction will not only severely affect the defendant's business (which it is desperately seeking to revive from devastating effects to the travel industry caused the *Covid*-19 pandemic), but will also severely damage the reputation of the SuperApp as a superapp.

[28] In my view, the balance of convenience lies in issuing it. Firstly, just because the plaintiffs' tickets are also sold on those other websites does not excuse the defendant. The issue here is whether the defendant's acts constitute trademark infringement, passing off, trade misrepresentation and unlawful interference in trade, and it is no excuse to say others may be doing it too.

[29] Secondly, irrespective of the nature of the complaints, they are still complaints. In these times of high competition amongst airlines, discerning travellers readily switch allegiance to other airlines if the services they are receiving from the one they usually frequent do not satisfy or meet their demands for hassle-free services. The likelihood of damage to the plaintiffs' business and reputation is real, not imagined. Loyalty and trust of customers, once lost, is probably difficult to regain.

[30] Thirdly, just because the trial dates are near does not mean that injunctive relief cannot issue. In fact, just days before the hearing of the plaintiff's application, the defendant filed another application, this time for protective, confidentiality and redaction orders over some of the documents it intended to adduce at the trial. Learned counsel for the defendant informed the court that some of them had yet to be adduced despite directions being issued at earlier case managements for the bundles of trial documents to be

filed by May to facilitate the trial in August. Which means that the parties would have identified the documents intended to be adduced much earlier, given the normal process of exchanging lists of such documents between them so that common bundles could be filed.

[31] Further, that new application is neither a formality nor a foregone conclusion, and there is no guarantee that the trial will proceed on those dates in August if the plaintiffs dispute it and the court has to resolve that dispute first before the trial proceeds. If those dates are vacated, given this court's heavy docket, giving the parties alternative trial dates this year will be a challenge, particularly as the court's available dates and the counsels' free dates have to be synchronised.

[32] Lastly, it is not the plaintiffs' duty or responsibility to support or prop up the defendant's business or the SuperApp, more so in this scenario where the plaintiff alleges that the use of the plaintiffs' marks and the sale of the plaintiffs' tickets on the SuperApp infringe the plaintiffs' rights. The defendant's commercial or reputation concerns are also not a matter that the court needs to consider.

[33] *New-West Management Group Sdn Bhd & Anor v. Ng Ah Kow & Anor* [2008] 8 CLJ 18 involved an application for an interlocutory injunction in an action for passing off. Despite the plaintiffs buying up the defendants' medical clinic business called "Klinik Ng dan Lee", the defendants thereafter continued for a while to run another clinic under the same name and then changed it to "Ng Lee Medical Centre". Ramli Ali J (as he then was) said of the balance of convenience in paras. 92-95 of his judgment as follows:

> The balance of convenience lies heavily in favour of granting the interlocutory injunction. The granting of the injunction would preserve *status quo* until the matter is finally dispensed with at the trial. The plaintiffs' long-established reputation and goodwill will be preserved and prevented from being dissipated with the grant of the interlocutory injunction. The reputation and goodwill established as a result of the quality of the plaintiff services would further not be lost and their position in the market they had established through long standing presence would not be unlawfully appropriated. It is further important to bear in mind that a substantial sum was paid for the business by the plaintiffs and pocketed by the defendants.
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> The prejudice to the defendants on the other hand would be minimal. As the plaintiffs have waived prayer 1(b) for the purposes of this application, the defendants would be free to continue with their business carrying a different name and style, which could be distinguished from "Klinik Ng dan Lee". The defendants might argue that this would cause significant inconvenience to them. However this is answered simply as follows: The defendants had received a handsome consideration for the sale of the business.

A They, as the plaintiffs saw value in the business identified with reference to the name of style "Klinik Ng dan Lee", which explains the consideration paid for the goodwill. By accepting the consideration and executing the agreements, they had accepted that the goodwill had been transferred to the benefit of the plaintiff. They have thus assigned those rights firstly to K&V Sdn Bhd and subsequently to the plaintiffs.

B If the injunction were not granted, it would result in the defendants pocketing the consideration and then acting in a manner completely inconsistent with what they had agreed all along. If allowed to continue until trial it would result in allowing the defendants to further damage the goodwill and reputation of the plaintiffs with the very money that they C had received from the plaintiffs. Thus in short, any alleged or perceived inconvenience that the defendants may suffer has been more than adequately compensated by the RM5,000,000 they had received from the plaintiffs.

If the injunction is not granted, it would further result in very important D Intellectual Property rights being disregarded after the plaintiffs had paid a significant consideration for it. It would further preserve *status quo* pending the final determination of this matter after trial.

[34] I likewise hold here that, on the facts and circumstances of this case, the balance of convenience lies in issuing the injunction sought.

E **Damages Not An Adequate Remedy**

[35] In *New-West Management Group*, (*supra*), Ramli Ali J (as he then was) also said of damages in para. [85] of his judgment:

Damages in passing off have been held to be notoriously difficult to F quantify. (*Sodastream v. Thorn Cascade Co. Ltd & Anor* [1982] RPC 459). Further the loss of goodwill and reputation suffered by the plaintiff cannot be quantifiable or compensated easily by damages.

[36] I concur with that statement, and therefore find that damages is not an adequate remedy.

G **The Relief To Be Ordered**

[37] The terms of the interim injunction that the plaintiffs seek as stated in the plaintiffs' application (with emphasis added) are:

That on the undertaking of the Plaintiffs to comply with any Order of this H Honourable Court as to damages in the event this Honourable Court is of the view that the defendant has suffered as a result of an Order given in this application and subsequently set aside:

1.1. That the Defendant, whether acting by itself, its servants, agents, contractors, representatives, officers, directors or howsoever otherwise be restrained and an interim injunction be I granted to restrain the defendant pending the full and final disposal of the action herein from:

(i) Infringing the Second Plaintiffs Registered Trademarks under Registrations Nos.: TM2020027468, 2013058014, 2013058015, 2010022523, 2010022524, 2013058000, 2013058002, 07005879, 07005880, 09002735, 09002736, 2017056926 (the registration details of which can be found in Schedule A annexed herein) in Malaysia ("Registrations"), by using the Offending Signs (as shown in Schedule B annexed herein) or any other trademarks or signs which are identical to and/or confusingly or deceptively similar with the Second Plaintiff's Registered Trademarks under the Registrations in the course of trade;

(ii) Passing off or attempting to pass off and/or enabling or assisting others to pass off its business and/or the Air Asia Super App ("SuperApp") as a business or application and/or platform associated with and/or licensed by and/or authorised by and/or in any way connected with the plaintiffs by using the Offending Signs (as shown in Schedule B annexed herein) and/or any signs or indicia which are identical with and/or deceptively or confusingly similar to the Malaysia Airlines Trademark and/or Firefly Trademarks (as set out in Schedule C annexed herein) and/or by selling the First plaintiff's and/or the Second Plaintiff's airline tickets (the "Plaintiffs' Airlines Tickets") on the SuperApp or any other platform;

(iii) Using forthwith the Offending Signs (as shown in Schedule B annexed herein) and/or any signs or indicia which are identical with and/or confusingly or deceptively similar to the Malaysia Airlines Trademarks and/or the Firefly Trademarks (as set out in Schedule C annexed herein), **where the use is likely to deceive or cause confusion, pursuant to section 76 of the Trademarks Act 2019; and**

(iv) Enabling, assisting, causing, procuring or authorising others to do any of the acts as stated in Prayer 1.1 (i), 1.1(H) and 1.1(iii) above.

(emphasis added)

[38] In this case interim injunctive relief, if issued, is to stop the act complained of pending the determination at full trial of the plaintiff's claims for trademark infringement, passing off, trade misrepresentation and unlawful interference with trade. The established first criteria of serious issue(s) to be tried for applications for interim injunctions is to identify the existence of such issues without making any determination on them.

[39] The words "infringing" and "passing off or attempting to pass off and/or enabling or assisting others to pass off" as emphasised above denote that the acts sought to be injuncted may already be deemed to constitute infringement and passing off, which denotation should be avoided at this stage. The defendant also needs to be assured and clear about what acts are injuncted, so as to avoid being in breach.

[40] In my view, the acts to be injuncted are adequately described by these words appearing in prayer 1.1 (ii) of the plaintiffs application, namely:

(i) using the offending signs (as shown in Schedule B annexed herein) and/or any signs or indicia which are identical with and/or deceptively or confusingly similar to the Malaysia Airlines Trademark and/or Firefly Trademarks (as set out in Schedule C annexed herein); and/or

(ii) selling the first plaintiffs and/or the second plaintiff's airline tickets (the "plaintiffs' airlines tickets") on the SuperApp or any other platform.

[41] Sub-prayer (iv), with appropriate modifications, should also be ordered, given the plaintiff's allegation that the defendant had earlier circumvented the plaintiffs' measures, on its own and also assisted by one Kiwi.com, by continuing to manage transactions for the sale of the plaintiffs' airline tickets on the SuperApp through other IATA agents.

Conclusion

[42] I thereby allowed the plaintiffs' application in the following terms:

> That on the undertaking of the Plaintiffs to comply with any Order of this Honourable Court as to damages in the event this Honourable Court is of the view that the Defendant has suffered as a result of an Order given in this application and subsequently set aside:
>
> 1.1. That the defendant, whether acting by itself, its servants, agents, contractors, representatives, officers, directors or howsoever otherwise be restrained and an interim injunction be granted to restrain the defendant pending the full and final disposal of the action herein from:
>
> (i) using the Offending Signs (as shown in Schedule B annexed herein) and/or any signs or indicia which are identical with and/or deceptively or confusingly similar to the Malaysia Airlines Trademark and/or Firefly Trademarks (as set out in Schedule C annexed herein);
>
> (ii) selling the First Plaintiff's and/or the Second Plaintiff's airline tickets (the "Plaintiffs' Airlines Tickets") on the SuperApp or any other platform; and/or
>
> (iii) enabling, assisting, causing, procuring or authorising others to do any of the acts as stated in 1.1 (i) or 1.1(H) above.

[43] As for costs of the plaintiffs' application, given the lengthy affidavits and submissions, I ordered the defendant to pay costs of RM25,000 to the plaintiffs, subject to allocatur.